Obata Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other cases

HIGH COURT (KUALA LUMPUR) — SUIT NOS WA-22NCVC-305–06 OF 2020, WA-22NCVC-301–06 OF 2020 AND WA-22NCVC-303–06 OF 2020
MOHD FIRUZ J
18 MAY 2021

Contract — Sale and purchase of property — Delivery of vacant possession — Buyers signed sale and purchase agreements ('SPAs') with developer in 2012 and 2013 agreeing to accept delivery of vacant possession of properties within 54 months of date of the SPAs — When SPAs were signed, developer had obtained consent of Minister/Housing Controller to extend statutory vacant possession delivery date from 36 months to 54 months under reg 11(3) of Housing Development (Control and Licensing) Regulations 1989 ('HDR') — Eight years after accepting vacant possession and liquidated and ascertained damages ('LAD') buyers sued developer saying extension of vacant possession delivery date given by Minister/Housing Controller was invalid based on recent Federal Court decision — Whether plaintiffs' failure to cite Minister/Housing Controller as parties to suit was fatal to their action — Whether writ action was in any case wrong mode as plaintiffs should have challenged decision of Minister/Housing Controller by way of judicial review — Whether plaintiffs' claims were time-barred under s 6(1)(a) Limitation Act 1953 — Whether plaintiffs were estopped from claiming for more LAD after having accepted LAD pursuant to settlement agreements they signed with developer — Whether developer did not contravene any law when SPAs were signed because at that time reg 11(3) of HDR allowed Minister/Housing Controller to extend statutory period for delivery of vacant possession — Whether it was absurd and against public policy to now contend that decision of Minister/Housing Controller was invalid based on decision of Federal Court made ten years later

The plaintiffs in the three suits herein had separately signed sale and purchase agreements ('SPAs') in 2012 and 2013 with the defendant to buy properties in a housing scheme developed by the latter. The SPAs followed the one prescribed in Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('the HDR') with one exception — instead of 36 months (as prescribed in Schedule H) within which time vacant possession of the properties had to be delivered to the plaintiffs, the time period stated in the SPAs was 54 months. The Minister/Controller of Housing had apparently approved the extension of time ('EOT') to 54 months in a letter to the defendant in December 2010. Following delivery of vacant possession of their respective properties to the plaintiffs in January 2017, the plaintiffs in Suits 301 and 305 signed settlement agreements ('SAs') accepting varying amounts

of liquidated and ascertained damages ('LAD') from the defendant for delivering vacant possession after the 54 months had expired. In 2020, following the Federal Court's decision in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee') the plaintiffs filed the instant suits contending that the EOT that was granted by the Minister/Housing Controller to the defendant in December 2010 was invalid as he had no power to vary/modify the statutory contract of sale in Schedule H and that the defendant accordingly must pay the balance of the LAD it owed the plaintiffs if the calculation was made after the expiry of 36 months from the dates of the SPAs. The three suits were determined without trial under O 14A of the Rules of Court 2012. The plaintiffs submitted that: (a) the defendant had no power to deviate from the terms prescribed in the statutory contract of sale in Schedule H of the HDR; (b) the EOT (which the plaintiffs claimed they had no knowledge of at the material time) granted to the defendant to extend time for delivery of vacant possession was null and void as it went against the decision in *Ang Ming Lee* that reg 11(3) of the HDR was ultra vires the Housing Development (Control and Licensing) Act 1966 ('the HDA') as the Minister/Controller of Housing had no power to waive or modify any provision in the Schedule H contract of sale; (c) since the plaintiffs did not know about the issuance of the EOT at the material time, they should not be faulted for not challenging the EOT by way of a judicial review application; (d) estoppel could not be raised to defeat the plaintiffs' claims as it was contrary to public policy to allow a party to waive or contract out of a statutory prescription especially when the HDA was a piece of social legislation designed to protect house buyers against developers; and (e) the plaintiffs' claims were not time-barred under the Limitation Act 1953. The defendant, on the other hand, said the three suits should be dismissed, inter alia, on the grounds that: (i) the plaintiffs should have challenged the EOT by way of a judicial review application at the appropriate time and that their filing of writ actions was wrong and an abuse of process; (ii) the plaintiffs' claims were time-barred; (iii) the plaintiffs in Suits 301 and 305 were estopped from claiming for further LAD after they had accepted payments pursuant to signing settlement agreements with the defendant; and (v) the decision in *Ang Ming Lee* did not have retrospective effect.

Held, dismissing the plaintiffs' suits:

(1) At the time the development was launched in the instant case, *Ang Ming Lee* had not been decided. Back then, the only way a developer could obtain an extension of time ('EOT') to hand over vacant possession and thus deviate from the prescribed Schedule H was by applying to the Minister pursuant to reg 11(3) of the HDR. When the SPAs herein were signed, the developer had already obtained approval from the Housing Controller on the EOT. In short, the defendant did not contravene any

law when it signed the SPAs with the plaintiffs. The notion that the defendant was wrong to deviate from the terms of Schedule H only came in the year 2020, which was about eight years after the defendant had received the approval from the Housing Controller and about four years after the defendant had entered into settlement agreements with the relevant plaintiffs on payment of the LAD (see para 25).

(2) The plaintiffs' contention that they had no knowledge of the EOT as the defendant did not extend a copy of the EOT to the purchasers was untenable. In their statement of claim, the plaintiffs had pleaded that the SPAs were in breach of Schedule H of the HDR as the time period for delivery of vacant possession had been varied from 36 months to 54 months. Through this statement, it was evident that the plaintiffs had knowledge of the 54-month time period. The plaintiffs' contention that no obligation could be imposed on them to file a judicial review application as the EOT was not provided to them did not hold water (see paras 32–34).

(3) The predominant and sole subject-matter of the plaintiffs' suits lay in the validity of the EOT. The same was within the sphere of public law. The EOT, being a decision of the Ministry of Housing and Local Government, could only be challenged by way of a judicial review application and not a writ action. It was improper and an abuse of court process for the plaintiffs to seek a declaration in the instant suit that the EOT was null and void because: (a) it was a challenge to the decision of a public authority, ie, the Minister and/or the Housing Controller in granting the EOT; and (b) the plaintiffs had only sued the developer and did not cite the Minister and the Housing Controller as parties. The failure to cite them as parties was fatal as both the Minister and/or the Housing Controller had to be given the right to be heard. As held in *Ang Ming Lee*, the absence of any affidavit from the Minister fortified the finding that there was no decision from the Minister (see paras 35–36).

(4) The plaintiffs' claims, which were filed on 18 June 2020, were time-barred under s 6(1)(a) of the Limitation Act 1953 given that the breach as alleged by them had occurred as early as 24 July 2012 in respect of Suit 301, 28 October 2013 in respect of Suit 303 and 11 and 18 July 2012 in respect of Suit 305. The limitation period of six years had set in to bar their claims. Although the HDA was a social legislation designed to protect house buyers against developers, in so far as the LAD claim was concerned, the protective hands of the court should not reach beyond the fence of the limitation period that was statutorily prescribed. Otherwise, it would give rise to gravely unfair and disruptive consequences for past transactions. A balance had to be struck between the right of the buyers in enforcing their rights to LAD and the law of limitation which required strict observance (see paras 43–44 & 53).

(5) As the instant suits were filed after the decision of the Federal Court in *Ang Ming Lee* without going through the process of judicial review, the defendant was undoubtedly caught off-guard and was clearly at a disadvantage in having to defend the decision of the Minister and/or Housing Controller given in 2010 against the decision in *Ang Ming Lee*, which was decided about ten years later. As the law back in 2013 allowed the developer to apply for a deviation of the terms of the prescribed SPA in Schedule H of the HDR, to allow the decision in *Ang Ming Lee* to apply to the facts of the instant cases would be absurd and against public policy. To do so would not only open unnecessary floodgates against all developers, leading to a crippling effect on the housing industry, but it would also lead to chaos in the courts without thousands of cases being filed claiming additional LAD based on *Ang Ming Lee* (see para 58).

(6) Estoppel applied to bar the claims of the plaintiffs in Suits 301 and 305. The settlement agreements they signed with the defendant were conclusive proof of the terms upon which they had settled their claims. Neither of them would be allowed to go back on that assumption as it was unfair and unjust to allow them to do so. Waiver of rights was a direct result of the settlement agreements signed by the plaintiffs in those two suits (see para 67).

[Bahasa Malaysia summary

Plaintif dalam tiga tindakan di sini telah menandatangani perjanjian jual beli ('PJB') secara berasingan pada tahun 2012 dan 2013 dengan defendan untuk membeli hartanah dalam skim perumahan yang dibangunkan oleh defendan. PJB tersebut adalah seperti yang ditetapkan dalam Jadual H Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1989 ('Peraturan') dengan satu pengecualian — bukan 36 bulan (seperti yang ditetapkan dalam Jadual H) dalam tempoh masa milikan kosong hartanah tersebut perlu diserahkan kepada plaintif, tempoh masa yang dinyatakan dalam PJB adalah 54 bulan. Menteri/Pengawal Perumahan sebenarnya telah meluluskan lanjutan masa ('EOT') kepada 54 bulan melalui surat kepada defendan pada Disember 2010. Berikutan penyerahan milikan kosong hartanah masing-masing kepada plaintif pada Januari 2017, plaintif dalam Guaman 301 dan 305 perjanjian penyelesaian yang ditandatangani ('SA') yang menerima jumlah perubahan ganti rugi tertentu dan ditetapkan ('LAD') daripada defendan bagi menyerahkan milikan kosong selepas 54 bulan telah tamat. Pada 2020, berikutan keputusan Mahkamah Persekutuan dalam *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee') plaintif memfailkan guaman semasa dengan alasan bahawa EOT yang telah diberikan oleh Menteri/Pengawal Perumahan kepada defendan pada Disember 2010 adalah tidak sah kerana beliau tidak mempunyai kuasa untuk mengubah/meminda kontrak jualan statutori dalam Jadual H dan defendan

sewajarnya perlu membayar baki LAD terhadap plaintif sekiranya pengiraan dibuat selepas tamat tempoh 36 bulan dari tarikh PJB. Ketiga-tiga guaman tersebut ditentukan tanpa perbicaraan di bawah A 14A Kaedah-Kaedah Mahkamah 2012. Plaintif berhujah bahawa: (a) defendan tidak mempunyai kuasa untuk menyimpang daripada terma yang ditetapkan dalam kontrak jualan statutori dalam Jadual H Peraturan; (b) EOT (yang didakwa plaintif mereka tidak mempunyai pengetahuan pada masa yang material) yang diberikan kepada defendan untuk melanjutkan masa penyerahan milikan kosong adalah terbatal dan tidak sah kerana ia bertentangan dengan keputusan dalam *Ang Ming Lee* bahawa peraturan 11(3) Peraturan adalah ultra vires Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta') kerana Menteri/Pengawal Perumahan tidak mempunyai kuasa untuk mengetepikan atau mengubah suai mana-mana peruntukan dalam kontrak jualan Jadual H; (c) memandangkan plaintif tidak mengetahui tentang pengeluaran EOT pada masa material, mereka tidak sepatutnya dipersalahkan kerana tidak mencabar EOT melalui permohonan semakan kehakiman; (d) estoppel tidak boleh dibangkitkan untuk membatalkan tuntutan plaintif kerana ia bertentangan dengan dasar awam untuk membenarkan sesuatu pihak mengetepikan atau menamatkan kontrak sepertimana preskripsi statutori terutamanya apabila Akta adalah satu perundangan sosial yang direka untuk melindungi pembeli rumah daripada pemaju; dan (e) tuntutan plaintif tidak dihalang oleh had masa di bawah Akta Had Masa 1953. Defendan, sebaliknya, menyatakan bahawa ketiga-tiga guaman tersebut harus ditolak, antara lain, atas alasan bahawa: (i) plaintif sepatutnya mencabar EOT melalui permohonan semakan kehakiman pada masa yang sesuai dan bahawa pemfailan guaman writ mereka adalah salah dan penyalahgunaan proses; (ii) tuntutan plaintif telah disekat dihalang oleh had masa; (iii) plaintif dalam Guaman 301 dan 305 telah di-estop daripada menuntut lanjutan LAD selepas mereka telah menerima bayaran setelah menandatangani perjanjian penyelesaian dengan defendan; dan (v) keputusan dalam *Ang Ming Lee* tidak mempunyai kesan retrospektif.

Diputuskan, menolak guaman plaintif:

(1) Pada masa pemajuan dilancarkan dalam kes semasa, *Ang Ming Lee* belum diputuskan. Pada masa itu, satu-satunya cara pemaju boleh mendapatkan lanjutan masa ('EOT') bagi penyerahan milikan kosong dan dengan itu menyimpang daripada Jadual H yang ditetapkan adalah dengan memohon kepada Menteri menurut peraturan 11(3) Peraturan. Apabila PJB di sini ditandatangani, pemaju telah mendapat kelulusan daripada Pengawal Perumahan mengenai EOT. Pendek kata, defendan tidak melanggar mana-mana undang-undang apabila ia menandatangani PJB dengan plaintif. Tanggapan bahawa defendan tersilap apabila menyimpang daripada terma Jadual H hanya timbul pada tahun 2020, iaitu kira-kira lapan tahun selepas defendan menerima kelulusan daripada Pengawal Perumahan dan kira-kira empat tahun selepas

defendan memasuki perjanjian penyelesaian. dengan plaintif yang berkaitan mengenai pembayaran LAD (lihat perenggan 25).

(2) Pendapat plaintif bahawa mereka tidak mempunyai pengetahuan tentang EOT kerana defendan tidak memberikan salinan EOT kepada pembeli adalah tidak boleh dipertahankan. Dalam pernyataan tuntutan mereka, plaintif telah memplidkan bahawa PJB telah melanggar Jadual H Peraturan kerana tempoh masa untuk penyerahan milikan kosong telah diubah daripada 36 bulan kepada 54 bulan. Melalui kenyataan ini, terbukti bahawa plaintif mempunyai pengetahuan mengenai tempoh masa 54 bulan. Pendapat plaintif bahawa tiada kewajipan boleh dikenakan ke atas mereka untuk memfailkan permohonan semakan kehakiman kerana EOT tidak diberikan kepada mereka tidak dapat dipertahankan (lihat perenggan 32–34).

(3) Perkara utama dan tunggal bagi tindakan plaintif terletak pada kesahihan EOT. Ia adalah dalam bidang undang-undang awam. EOT, yang merupakan keputusan Kementerian Perumahan dan Kerajaan Tempatan, hanya boleh dicabar melalui permohonan semakan kehakiman dan bukannya tindakan writ. Ia adalah tidak wajar dan satu penyalahgunaan proses mahkamah bagi plaintif untuk memohon deklarasi dalam guaman semasa bahawa EOT adalah terbatal dan tidak sah kerana: (a) ia merupakan satu cabaran kepada keputusan pihak berkuasa awam, iaitu, Menteri dan/atau Pengawal Perumahan dalam memberikan EOT; dan (b) plaintif hanya menyaman pemaju dan tidak merujuk Menteri dan Pengawal Perumahan sebagai pihak. Kegagalan untuk merujuk mereka sebagai pihak telah memudaratkan kerana kedua-dua Menteri dan/atau Pengawal Perumahan perlu diberi hak untuk didengari. Seperti yang diputuskan dalam *Ang Ming Lee*, ketiadaan sebarang afidavit daripada Menteri menguatkan dapatan bahawa tiada keputusan daripada Menteri (lihat perenggan 35–36).

(4) Tuntutan plaintif, yang difailkan pada 18 Jun 2020, telah dihalang oleh had masa di bawah s 6(1)(a) Akta Had Masa 1953 memandangkan pelanggaran seperti yang didakwa oleh mereka telah berlaku seawal 24 Julai 2012 berkenaan dengan Guaman 301, 28 Oktober 2013 berkenaan dengan Guaman 303 dan 11 dan 18 Julai 2012 berkenaan dengan Guaman 305. Tempoh had enam tahun telah berjalan untuk menghalang tuntutan mereka. Walaupun Akta merupakan perundangan sosial yang direka bentuk untuk melindungi pembeli rumah daripada pemaju, setakatmana tuntutan LAD, perlindungan Mahkamah tidak seharusnya menjangkau melebihi tempoh had yang ditetapkan oleh undang-undang. Jika tidak, ia akan menimbulkan akibat yang sangat tidak adil dan mengganggu urus niaga masa lalu. Keseimbangan perlu dicapai antara hak pembeli dalam menguatkuasakan hak mereka terhadap LAD dan undang-undang had yang memerlukan pematuhan

ketat (lihat perenggan 43–44 & 53).

(5) Memandangkan guaman semasa difailkan selepas keputusan Mahkamah Persekutuan dalam *Ang Ming Lee* tanpa melalui proses semakan kehakiman, defendan sudah pasti tergamam dan jelas berada dalam kekurangan kerana perlu mempertahankan keputusan Menteri dan/atau Pengawal Perumahan yang diberikan pada 2010 terhadap keputusan dalam *Ang Ming Lee*, yang diputuskan kira-kira sepuluh tahun kemudian. Memandangkan undang-undang pada tahun 2013 membenarkan pemaju memohon penyimpangan syarat PJB yang ditetapkan dalam Jadual H Peraturan, untuk membenarkan keputusan dalam *Ang Ming Lee* untuk diguna pakai kepada fakta kes semasa adalah tidak masuk akal dan bertentangan dengan dasar awam. Untuk berbuat demikian bukan sahaja akan memecahkan tembok yang tidak perlu terhadap semua pemaju, yang membawa kepada kesan yang melumpuhkan industri perumahan, tetapi ia juga akan membawa kepada huru-hara di mahkamah tanpa beribu-ribu kes difailkan menuntut LAD tambahan berdasarkan *Ang Ming Lee* (lihat perenggan 58).

(6) Estoppel dimohon untuk menghalang tuntutan plaintif dalam Guaman 301 dan 305. Perjanjian penyelesaian yang mereka tandatangani dengan defendan adalah bukti muktamad bagi terma-terma di mana mereka telah menyelesaikan tuntutan mereka. Kedua-dua mereka tidak akan dibenarkan untuk kembali kepada andaian bahawa ia adalah tidak adil dan tidak saksama untuk membenarkan mereka berbuat demikian. Penepian hak adalah hasil langsung daripada perjanjian penyelesaian yang ditandatangani oleh plaintif dalam kedua-dua guaman tersebut (lihat perenggan 67).]

Cases referred to

Abdillah bin Labo Khan v PP [2002] 3 MLJ 298; [2002] 3 CLJ 521, CA (refd)
Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (folld)
Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and other applications [2020] 10 MLJ 689, HC (folld)
Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2020] 1 CLJ 162, FC (distd)
Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur [2006] 2 MLJ 137, FC (refd)
Ayob bin Salleh v AmGeneral Insurance Bhd & Anor [2015] 11 MLJ 301, HC (refd)
Chan Kwai Chun v Lembaga Kelayakan [2002] 3 MLJ 550; [2002] 3 CLJ 231, CA (refd)
Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409, SC (refd)

A *Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693; [2017] 10 CLJ 385, FC (refd)
Dr Lourdes Dava Raj a/l Curuz Durai Raj v Dr Milton Lum Siew Wah & Anor [2020] 5 MLJ 185, FC (refd)
Encony Development Sdn Bhd v Robert Geoffrey Gooch & Anor [2016] 3 MLJ
B 400; [2016] 1 CLJ 893, CA (distd)
Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)
Hadi bin Hassan v Suria Records Sdn Bhd & Ors [2005] 3 MLJ 522, HC (refd)
Hedgeford Sdn Bhd v Sri Gananatha a/l Sivanathan & Ors [2018] MLJU 1424; [2018] 1 LNS 1497, HC (refd)
C *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221; [1991] 1 CLJ Rep 174, HC (refd)
Ketua Pengarah Hasil Dalam Negeri v Metacorp Development Sdn Bhd (Civil Application No 08(F)-371 of 2011 (W)) (unreported), FC (refd)
Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another
D *appeal* [2006] 3 MLJ 597; [2006] 2 CLJ 835, CA (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697; [2017] 5 CLJ 418, FC (refd)
Ling Peek Hoe & Anor v Ding Siew Ching and another appeal [2017] 5 MLJ
E 385; [2017] 7 CLJ 641, FC (refd)
Majlis Perubatan Malaysia & Anor v Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) [2019] 1 MLJ 471, CA (refd)
Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors [2010] 9
F MLJ 603, HC (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (folld)
Oxbridge Height Sdn Bhd v Abdul Razak Mohd Yusof & Anor [2014] MLJU 1932; [2015] 2 CLJ 252, CA (refd)
PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other
G *appeals* [2021] 2 MLJ 60; [2021] 2 CLJ 441, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors [1995] 4 MLJ 764, HC (refd)
Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [1999] 3
H MLJ 157, CA (refd)
Powernet Industries Sdn Bhd v Golden Wheel Credit Sdn Bhd [2020] 12 MLJ 412; [2020] 10 CLJ 374, CA (refd)
SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31; [1982] CLJ Rep 305, FC (distd)
I *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852; [2008] 4 CLJ 618, CA (distd)
Sri Damansara Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors [2020] MLJU 170; [2020] 1 LNS 146, HC (distd)
Sunitha Madhu (membawa tindakan ini sebagai pentadbir sah harta pusaka

simati, Madhu a/l KV Dharan) v Palayam a/l Nagappan & Ors [2021] MLJU 301; [2021] 1 LNS 296, HC (refd)
Sunway D' Mont Kiara Sdn Bhd v Pesuruhjaya Khas Cukai Pendapatan and another application [2016] MLJU 1840; [2018] 7 CLJ 666, HC (folld)
Suruhanjaya Pelabuhan Pulau Pinang v Boss s/o Ramasamy [2000] 4 MLJ 153, CA (refd)
Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd [2017] 1 MLJ 689; [2016] 8 CLJ 163, FC (refd)
Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd [2011] 2 MLJ 141; [2009] 6 CLJ 232, FC (distd)
Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1, PC (folld)

Legislation referred to

Contracts Act 1950 s 6(4)
Housing Development (Control and Licensing) Act 1966
Housing Development (Control and Licensing) Regulations 1989 reg 11(3), Schedule H
Limitation Act 1953 s 6(1), (1)(a)
Rules of Court 2012 O 14, O 14A, O 14A r 1, O 18 r 19, O 53, O 53 r 3(6)

Wong Renn Xin (KL Wong) for the plaintiff.
Lai Chee Hoe (Ooi Xin Yi with him) (Chee Hoe & Assoc) for the defendant.

Mohd Firuz J:

[1] The present matter before me deals with the following three cases:

(a) Civil Suit No WA-22NCVC-301–06 of 2020: Asmaziah bt Abu Bakar v Prema Bonanza Sdn Bhd ('Suit 301');

(b) Civil Suit No WA-22NCVC-303–06 of 2020: Foong Chee Tek and Tan Wan Chen v Prema Bonanza Sdn Bhd ('Suit 303'); and

(c) Civil Suit No WA-22NCVC-305–06 of 2020: Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd ('Suit 305').

[2] All three suits were filed on 18 June 2020. As the facts are similar in broad facts and arose from the same development project, I heard them together on 15 March 2021.

BRIEF FACTS OF THE CASE

[3] The plaintiffs are purchasers to a development named The Sentral Residence located at the KL Sentral, Kuala Lumpur ('the development'). The defendant is the developer to the development.

[4] The plaintiffs have entered into sale and purchase agreements ('SPA') prescribed under Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('the HDR') on various dates as follows:

(a) Suit 301 — SPA dated 24 July 2012;

(b) Suit 303 — SPA dated 28 October 2013; and

(c) Suit 305 — SPA dated 11 July 2012 and 18 July 2012.

[5] Vacant possession was delivered by the defendant to the plaintiffs on 25 January 2017 and that the common facilities were completed on 6 January 2017 (the date when the certificate of completion and compliance was issued).

[6] The plaintiffs in Suit 301 and Suit 305 have before the filing of the current action accepted from the defendant LAD in respect of the late delivery of vacant possession of parcel based on a calculation of 54 months from the date of the SPA:

(a) Suit 301 — RM7,443.29 and RM17,686.85 via two settlement letters dated 8 March 2017 and 14 June 2017; and

(b) Suit 305 — RM10,017.53 in respect of parcel A-31-F and RM16,891.51 in respect of parcel A-31-G via two settlement letters both dated 14 March 2017.

[7] It is the plaintiffs' case that in light of the Federal Court's decision in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162 ('Ang Ming Lee'), the extension of time granted to the defendant vide a letter dated 16 December 2010 signed by one Khairul Azhar (Nik) bin Abu Bakar to hand over vacant possession of the parcels from 36 months as required in the prescribed Schedule H to 54 months as envisaged in the SPAs are invalid. It is also the plaintiff's case that the calculation of the liquidated ascertained damages ('LAD') should be based on 36 months in the prescribed Schedule H instead of the 54 months stated in the SPA.

[8] Hence, the plaintiffs commenced proceedings against the defendant seeking for the following reliefs:

(a) Satu deklarasi bahawa apa-apa surat yang diberikan untuk perlanjutan masa (jika ada) di bawah peraturan 11(3) Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Perlesenan) 1989 untuk Defendan untuk menyerahkan milikan kosong ('vacant possession') Hartanah tersebut kepada Plaintiff dan melengkapkan kemudahan bersama ('common facilities') dari tempoh masa tiga puluh enam (36) bulan ke lima puluh empat (54) bulan adalah tidak sah selaras dengan keputusan Mahkamah Persekutuan dalam kes *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ

281; [2020] 1 CLJ 162;

(b) Satu deklarasi bahawa Defendan adalah dikehendaki mematuhi dan terikat kepada Jadual H Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 untuk menyerahkan milikan kosong ('vacant possession') Hartanah tersebut kepada Plaintiff dan melengkapkan kemudahan bersama ('common facilities') dalam tempoh masa tiga puluh enam (36) bulan dikira dari tarikh Perjanjian Jual Beli tersebut ditandatangani;

(c) Satu perintah bahawa Defendan dikehendaki membayar kepada Plaintiff untuk ganti rugi tertentu untuk kelewatan penyerahan milikan kosong ('vacant possession') Hartanah tersebut dan pelengkapan kemudahan bersama ('common facilities') seperti berikut:-

Tuntutan Plaintif

(i) Defendan adalah diperintahkan untuk membayar kepada Plaintif jumlah wang sebanyak RM 684,953.42; (in respect of Suit 305) [for Suit 301: RM 307,035.61; for Suit 303: RM55,230.90; respectively];

(ii) *Faedah pada kadar 5% setahun ke atas jumlah RM 684,953.42 (in respect of Suit 301: RM 307,035.61; for Suit 303: RM55,230.90; respectively) dikira dari tarikh tindakan ini difailkan sehingga tarikh pembayaran penuh;*

(d) Kos tindakan ini atas dasar peguamcara dan anakguam; dan

(f) Lain-lain perintah, relief dan/atau gantirugi yang adil dan munasabah yang difikirkan sesuai oleh Mahkamah Yang Mulia ini.

THE PLAINTIFFS' O 14 APPLICATION

[9] On 10 August 2020, the plaintiffs filed their application to enter summary judgment against the defendant dated 7 August 2020 pursuant to O 14 of the Rules of Court 2012 ('encl 6') in all three suits.

[10] The defendant vehemently resisted encl 6 and raised multiple issues to be determined before this court. Parties then proceeded to file their respective submissions. Hearing of encl 6 was fixed on 13 October 2020.

[11] Having reviewed the respective submissions by both parties, I formed the view that there were no serious factual disputes involved. The case in fact revolves on a number of legal issues which could be resolved by way of an O 14A application which provides that the court has powers on its own motion to determine any question of law where it appears to the court that:

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

[12] In this regard O 14A r 1 states as follows:

> (1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that —
>
> (a) such question is suitable for determination without the full trial of the action; and
>
> (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
>
> (2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.
>
> (3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.
>
> (4) The jurisdiction of the Court under this Order may be exercised by a Registrar.
>
> (5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provisions of these Rules.

[13] To my mind, all the necessary facts and matters are before this court in order for it to determine the questions of law or construction. The determination of the said issues of law is likely to save time and costs for all parties concerned without a trial. Hence, directions were given for the same to be filed wherein the defendant volunteered to do so. Both parties were to consult each other for purposes of formulating the questions to be determined by this court.

THE DEFENDANT'S APPLICATION TO STRIKE OUT THE PLAINTIFFS' SUIT

[14] Despite this court directing for an O 14A application to be filed, the defendant on 18 November 2020 proceeded to file an application to strike out the plaintiffs' suit pursuant to O 18 r 19 of the Rules of Court 2012 ('the RC') on the following grounds ('encl 20'):

> (a) the plaintiffs claim is time barred under the Limitation Act 1953;
>
> (b) the plaintiffs had failed to provide particulars as to why it has the right to claim liquidated ascertained damages outside the scope of the sale and purchase agreement;
>
> (c) in the alternative, the plaintiffs' claim cannot be ascertained vide a writ action and ought to be pursued vide a judicial review; and

(d) the plaintiffs' claim is frivolous, vexatious, prejudicial against the defendant, unjust, and an abuse of the process of the court and should be immediately struck out.

THE ORDER 14A APPLICATION

[15] Two days later ie 20 November 2020, the defendant proceeded to file the following respective O 14A applications as directed:

(a) encl 22 in Suit 301;

(b) encl 23 in Suit 303; and

(c) encl 22 in Suit 305,

(collectively referred to as the 'O 14A applications').

[16] Save for Suit 303 wherein the question on estoppel does not arise, the questions posed in the defendant's O 14A applications are as follows:

Limitation Period

1.1 Does the cause of action claimed by the plaintiffs accrue from the date of the SPA?

1.2 Has limitation period set in in that regard?

1.3 If the answers to questions 1.1 and 1.2 are in the *negative*:

(a) when does the cause of action claimed by the plaintiffs accrues?

(b) whether it is at the point where booking fee is paid, date of the SPA or the date of vacant possession delivered?

Knowledge and Consent

1.4 Did the plaintiffs enter into the SPA with free consent?

1.5 Are parties bound by the terms of the SPA and/or agreement?

1.6 If the answers to questions 1.4 and 1.5 are in the *negative*:

(a) was there any vitiating factor to defeat free consent, pleaded and established by the plaintiffs?

(b) in the absence of any vitiating factor, does the court have power to vary the terms of the SPA?

Wrong Mode

1.7 Is commencing the suit through a writ action to claim LAD before challenging the EOT granted an abuse of court process?

1.8 If the answer to Question 1.7 is in the *negative*:

(1) are the plaintiffs allowed to commence the suit through a writ instead of a judicial review?

Liquidated Ascertained Damages ('LAD')

A 1.9 Are the plaintiffs entitled to claim for LAD based on a period of 36 months in lieu of 54 months stated in the SPA?

1.10 If the answer to question 1.9 is in the *affirmative*:

(a) are the plaintiffs required to particularise damages and establish losses incurred?

B

(b) is the formula provided in the term of the SPA in calculating LAD applicable to the LAD claim for the period between the 36th month to the 54th month?

Estoppel

C

1.11 Are the plaintiffs estopped from claiming LAD after signing of the settlement letter?

Unjust Enrichment

1.12 Are the plaintiffs enriched by being allowed a claim from the 36th month onwards?

D

1.13 Is the retention of LAD for the period from the 36th month to the 54th month unjust?

1.14 Is the enrichment gained by the plaintiffs at the developer's expenses?

E *Retrospective Effect*

1.16 Does the decision of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162 have retrospective effect?

Miscellaneous

F

1.16 Is the defendant allowed to deviate from the terms of the prescribed contract of sale in Schedule H?

1.17 If the answers to questions 1.1, 1.2, 1.4, 1.5, 1.7, 1.11, 1.12, 1.13 and/or 1.14 are in the affirmative, should the plaintiffs' suit be struck out?

G 1.18 Can a Minister who is empowered to regulate and prohibit the conditions and terms of any contract between a licensed housing developer and his purchaser, delegate the exercise of such powers or the performance of such duties to the Controller of Housing?

H SUMMARY OF THE PLAINTIFFS' SUBMISSION

[17] The plaintiffs' submission in support of their pleaded case can be summarised as follows:

I (a) the SPA signed between the plaintiffs and the defendant is a prescribed Schedule H contract of sale and it is regulated by statute. Being a statutory contract, the defendant is not allowed to deviate or add or vary any of the terms prescribed in Schedule H. Based on the decision in the cases of *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852; [2008] 4 CLJ 618 and *SEA Housing Corporation Sdn Bhd v Lee Poh*

Choo [1982] 2 MLJ 31; [1982] CLJ Rep 305, that defendant housing developer does not enjoy the freedom to vary any of the terms in the prescribed Schedule H of the HDR (see also *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232, *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162);

(b) it is the plaintiffs' case that they have no knowledge of the extension of time ('EOT') granted by the Minister to the defendant as she was not extended a copy of the EOT. Under such circumstances, they cannot be faulted for theirfailure to file a judicial review application as required under O 53 r 3(6) of the RC;

(c) the EOT granted (which is denied), is null and void by reason of the Federal Court decision in *Ang Ming Lee* which held that reg 11(3) of the HDR is ultra vires the Act and the Controller has no power to waive or modify any provision in the Schedule H contract of sale.

(d) even if the EOT was granted, it is a void decision which can be ignored as if the original decision had never existed (reliance placed on the Court of Appeal decision in *Chan Kwai Chun v Lembaga Kelayakan* [2002] 3 MLJ 550; [2002] 3 CLJ 231 which was duly approved by the Federal Court in *Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd* [2017] 1 MLJ 689; [2016] 8 CLJ 163;

(e) the decision in *Ang Ming Lee* has clearly stated that reg 11(3) of the HDR is ultra vires. It follows that any EOT purportedly granted pursuant to reg 11(3) of the HDR is null and void. The defendant is therefore bound to deliver vacant possession within the prescribed time period of 36 months as stipulated in the prescribed form of contract of sale in Schedule H. Relying on the case of *Sri Damansara Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors* [2020] MLJU 170; [2020] 1 LNS 146, the courts are duty bound to take cognizance of an illegality. It is contrary to public policy to allow an illegality to be perpetrated;

(f) in claiming for LAD, there is no need for the plaintiffs to prove their losses strictly. This is based on the fact that the SPA herein is not an ordinary contract of sale but a statutory based contract of sale as regulated in Schedule H of the HDR. Such was held by Gopal Sri Ram JCA (later FCJ) in the case of *Sentul Raya*;

(g) the plaintiffs being the purchasers are not estopped from pursuing their claim for LAD. This is by virtue of the fact that the purchasers claim herein is premised on a completion period of 36 months. In this regard, the purchasers are now claiming for the unpaid LAD between the 36th

and 54th month which they are entitled to receive under the law. In support of this contention, the plaintiffs relied on the following authorities:

(i) *Encony Development Sdn Bhd v Robert Geoffrey Gooch & Anor* [2016] 3 MLJ 400; [2016] 1 CLJ 893;

(ii) *Oxbridge Height Sdn Bhd v Abdul Razak Mohd Yusof & Anor* [2014] MLJU 1932; [2015] 2 CLJ 252; dan

(iii) *Hedgeford Sdn Bhd v Sri Gananatha a/l Sivanathan & Ors* [2018] MLJU 1424; [2018] 1 LNS 1497.

(h) the doctrine of estoppel cannot be invoked as against statutory provisions. Similarly, it is contrary to public policy for a litigant to be permitted to waive or to contract out of the provisions of a written law parties cannot (reliance placed on the decision in *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221; [1991] 1 CLJ Rep 174; *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [1999] 3 MLJ 157; *Powernet Industries Sdn Bhd v Golden Wheel Credit Sdn Bhd* [2020] 12 MLJ 412; [2020] 10 CLJ 374);

(i) the Housing Development (Control and Licensing) Act 1966 ('the HDA') is a social legislation designed to protect the house buyers against the developers and hence the interests of the purchasers shall be the paramount consideration against the developer (see the Federal Court decision in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60; [2021] 2 CLJ 441);

(j) on the point that the plaintiffs claim is barred by limitation, the plaintiffs contend that the purchasers' cause of action to claim for LAD pursuant to schedule H of the HDR shall accrue on the date the plaintiffs take delivery of vacant possession. In fact, cl 25(3) of the SPA reflects this position. This means that the plaintiffs' claim is not time barred as contended by the defendant; and

(k) the Federal Court decision in *Ang Ming Lee* has retrospective effect (see *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298; [2002] 3 CLJ 521; *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418; *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457; *Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693; [2017] 10 CLJ 385; and *Ling Peek Hoe & Anor v Ding Siew Ching and another appeal* [2017] 5 MLJ 385; [2017] 7 CLJ 641). The doctrine of stare decisis dictates that this court ought to apply the principles the law expounded in the aforesaid decision.

THE DEFENDANT'S SUBMISSION

[18] The defendant on the other hand contended that the plaintiffs' suit cannot stand. A summary of the crux of the defendant's submissions are set below:

(a) the plaintiffs have commenced the action via a wrong mode to challenge the validity of EOT;

(b) limitation period has set in to bar the plaintiffs' claim as the cause of action has accrued as early as from the date of the SPA;

(c) the plaintiffs entered into the SPA with free consent and are bound by the terms of the SPA;

(d) the plaintiffs are not entitled to claim outside the scope of the SPA;

(e) the plaintiffs have failed to particularize or provide any proof of actual loss;

(f) the plaintiffs in Suit 301 and Suit 305 are estopped from claiming LAD after signing the settlement letter; and

(g) the Federal Court decision in *Ang Ming Lee* does not have retrospective effect.

[19] Premised on the above reasons, the defendant contended that this court ought to dismiss the writ and statement of claim for all three suits.

COURT'S ANALYSIS AND FINDINGS

[20] I begin my analysis with a comparison of the facts herein and the facts in the case of *Ang Ming Lee*. It should be noted that the facts in *Ang Ming Lee* involve two EOTs which were granted by the controller to the developer. The first EOT was granted before the SPAs with the purchasers were signed, whilst the second EOT was granted upon the conclusion of the SPAs with the purchasers. My findings on this comparison exercise are set out as follows:

(a) firstly; the plaintiffs in the case of *Ang Ming Lee* brought the suit via a judicial review whereas the plaintiffs in the present case initiated the action via a writ;

(b) secondly, in the case of *Ang Ming Lee* the aggrieved purchasers who were unable to claim LAD, commenced action by way of judicial review against the Minister, the Controller of Housing and the developer seeking: (i) an order of certiorari, quashing the decision of the Controller; and (ii) a declaration either jointly or in the alternative, that: (a) the letter allowing the EOT given by the Controller was invalid and beyond the jurisdiction stipulated in the Housing Development

(Control and Licensing) Act 1966 ('the Act'); and (b) reg 11(3) of the Regulations was ultra vires the Act (this is similar to the case of *Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and other applications* [2020] 10 MLJ 689). In the present cases before me, neither the Minister nor the Controller has been brought in as a party. Neither does the plaintiffs seek to quash the EOT granted by the Controller to the defendant; and

(c) thirdly, in *Ang Ming Lee* the Federal Court was not required to deal with the issue of an SPA being time barred pursuant to s 6(1) of the Limitation Act 1953.

[21] It is also my observation that the rest of cases referred to by the plaintiffs do not involve a judicial review application process against the Minister and/or the Controller and the developer for allowing the developer's application for EOT. These cases also do not deal with a suit commenced pursuant to a cause of action based on a SPA which is purportedly statute barred unlike in the present case. As such much of the findings in the following cases relied upon by the plaintiffs can be distinguished:

(a) *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852; [2008] 4 CLJ 618: this case concerns a claim by the purchasers for LAD in respect of the late delivery of vacant possession by virtue of the 1997 financial crisis. The court dealt with questions on whether the principles of frustration and enlargement of time under the Contracts Act 1950 should apply and no issue of EOT is involved in this case. In fact, the court held that the plea of frustration should fail on the basis that reg 11(3) of the Regulations allows the appellant to make representations to the Controller of Housing 'owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary';

(b) *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31; [1982] CLJ Rep 305: this case similarly dealt with a pure claim of LAD with no issue of EOT involved. The dispute revolves around the insertion of a clause by the developer to escape liability in respect of its fulfillment of the terms of the SPA;

(c) *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232: this case concerns a dispute on the manner in which the vacant possession of the apartments is to be delivered (via the issuance of the vendor's architect certificate) and the purchasers claimed LAD for late delivery in that regard. There was no issue of time bar involved. The appeal was dismissed on the basis that the point was not pleaded before the court of first instance;

(d) *Sri Damansara Sdn Bhd v Tribunal Tuntutan Pembeli Rumah &*

Ors [2020] MLJU 170; [2020] 1 LNS 146: this case was premised on a judicial review application (unlike the present case which was commenced via a writ action) to review the decision of the Tribunal Tuntutan Pembeli Rumah with respect to the computation of the LAD; and

(e) *Encony Development Sdn Bhd v Robert Geoffrey Gooch & Anor* [2016] 3 MLJ 400; [2016] 1 CLJ 893: this case involved purchasers who failed to comply with progress billing demands and sought to rely on the purported existence of a collateral contract subsisted alongside the SPA. The developer on the other hand sought to terminate the SPA and forfeit the deposit. No issues of EOT and limitation period were involved for determination.

[22] Premised on the above comparison, I propose to deal with the questions posed for determination based on the facts peculiar to the present case. The answers to the questions posed are in the following order:

(i) is the defendant allowed to deviate from the terms of the prescribed contract of sale in Schedule H?

(ii) can a Minister who is empowered to regulate and prohibit the conditions and terms of any contract between a licensed housing developer and his purchaser, delegate the exercise of such powers or the performance of such duties to the Controller of Housing?

(iii) does the decision of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162 have retrospective effect?

(iv) is commencing the suit through a writ action to claim LAD before challenging the EOT granted an abuse of court process?

(v) are the plaintiffs allowed to commence the suit through a writ instead of a judicial review?

(vi) does the cause of action claimed by the plaintiffs accrue from the date of the SPA?

(vii) has limitation period set in in that regard? and

(viii) are the plaintiffs estopped from claiming LAD after signing of the settlement letter?

Determination on questions (i) and (ii)

[23] In answer to the question whether a developer such as the defendant herein is allowed to deviate from the terms of the prescribed contract of sale in

Schedule H, I answer in the negative. In this regard, I agree with the submissions of the plaintiffs on this point which predominantly relied on the Federal Court decision in *Ang Ming Lee* (see para [17] above).

[24] In answer to the question whether a Minister who is empowered to regulate and prohibit the conditions and terms of any contract between a licensed housing developer and his purchaser, delegate the exercise of such powers or the performance of such duties to the Controller of Housing the FederaI Court decision in *Ang Ming Lee* has clearly answered the same question in the negative. Pursuant to the doctrine of stare decisis the ratio in *Ang Ming Lee* is binding on me.

[25] Despite answering both questions in the negative, I am constraint to state the following:

(a) at the time the development was launched *Ang Ming Lee* was not yet decided. Back then, the only way a developer can obtain an extension of time to handover vacant possession and thus deviating from the prescribed Schedule H was by applying to the Minister pursuant to the reg 11(3) of the Regulations under the HDA. Support for this proposition can be found in the case of *Sentul Raya Sdn Bhd* where Sri Ram JCA (later FCJ) stated as follows:

> Under reg 11(3) of the Regulations it is open for the appellant to make representations to the Controller of Housing — to quote from the Regulations — 'owing to special circumstances or hardship, or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary'.

(b) when the SPAs were signed in 2012 and 2013 respectively (Suit 301: 24 July 2012; Suit 303: 28 October 2013; Suit 305: 11 July 2012 (Parcel A-31-G) and 18 July 2012 (Parcel A-31-F, respectively) between parties, the defendant (developer) had already obtained approval from the Housing Controller to complete the handing over of the parcels concerned to its purchasers including the plaintiffs. In short, the defendant did not contravene any law when they signed the SPA with the plaintiffs; and

(c) the notion that the defendant was wrong to deviate from the prescribed Schedule H only came in the year 2020 which is about eight years later from the date the defendant received the approval from the Housing Controller and about four years after the defendant entered into a settlement agreement with the plaintiffs on the LAD.

[26] Having said the above, I now proceed to answer the question whether the decision in *Ang Ming Lee* applies retrospectively.

Determination on question (iii)

[27] In answer to the question whether the decision in *Ang Ming Lee* applies retrospectively, I agree with the submission of the plaintiffs on this issue and answer in the affirmative.

[28] In this regard, I agree with the view of Wong Kian Keong J in *Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and other applications* [2020] 10 MLJ 689 that as a general rule, a written judgment has retrospective effect save for situations where the doctrine of prospective overruling is applied.

[29] Despite agreeing with the plaintiffs' submissions that the decision in *Ang Ming Lee* applies retrospectively, I am still of the view that this does mean that the plaintiffs are entitled to succeed in their suit against the defendant. My rational for opining so can be found in my answers to the following questions.

Determination on question (iv) and (v)

[30] Both questions deal with the issue as to whether the plaintiffs' action in commencing the present suit by way of a writ action and not by the mode of a judicial review is proper or otherwise. In considering this issue, I am guided by the decision in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865 where the Federal Court reiterated as follows:

> [61] ... However, O 53 RHC sets out a specific procedure for an aggrieved party seeking relief, incorporating a declaration (as provided by s 41 of the Specific Relief Act) against a public authority for infringement of his rights to which he was entitled to be protected under public law, to follow. It is our view that when such an explicit procedure is created (as compared to a general provision set out under O 15 r 16 RHC) to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O 53 RHC, otherwise it is liable to be struck off for abusing the process of the court ...
>
> [62] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O 53 RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambry. Much depends on the facts of the case. But generally the court should be

A circumspect in allowing a matter which should be by way of O 53 RHC to proceed in another form. To say that it is open to an applicant seeking judicial review to elect any mode he prefers, as implied in Kuching Waterfront, would, in our considered opinion, be rendering O 53 RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule B is in the interest of good administration, then this rule must be adhered to, except in the limited and exceptional circumstances discussed.

[31] The case of *Ahmad Jefri* was followed by the Court of Appeal in *Majlis Perubatan Malaysia & Anor v Asia Pacific Higher Learning Sdn Bhd (registered* C *owner and licensee of the higher learning institution Lincoln University College)* [2019] 1 MLJ 471 where the court propounded the principle that a potential litigant is required to analyse the nature of its claim and mount it correctly in either one or the other of the two adjectival modes. If an action is predominantly public in nature, then the action lies in O 53 of the Rules of D Court 2012.

[32] The plaintiffs' counsel in reply sought to argue that the plaintiffs have no knowledge of the EOT as the developer did not extend a copy of the EOT to the purchasers. E

[33] Having scrutinised the pleadings and the submission by both counsel for the plaintiffs and the defendant, I am of the view that the plaintiffs' contention in untenable. The plaintiffs have at paras 6–7 of the statement of claim pleaded that the SPA signed by the parties is in breach of Schedule H of F the HDR as the time period for delivery of vacant possession has been varied from 36 months to 54 months.

[34] Through this statement, it is evident that the plaintiffs had knowledge of the 54 months being the time period of delivery of vacant possession and the G completion of common facilities. The plaintiffs' contention that no obligation can be imposed on the purchasers to file a judicial review application as the EOT is not provided to them, therefore does not hold water.

H **[35]** I find favour in the defendant's counsel argument that the predominant and sole subject matter of the plaintiff's suit lies on the validity of the EOT. The same is within the sphere of the public law which was challenged by the plaintiffs and the EOT being a decision granted by the Ministry of Housing and Local Government can only be challenged by way of a judicial review and I not a writ action.

[36] It is my considered view that the plaintiffs' conduct in filing this suit to seeking, inter alia, a declaration that the EOT granted by the defendants herein null and void pursuant to the Federal Court decision in *Ang Ming Lee*, is

improper and an abuse of court process. Firstly, an application to challenge a decision of a public authority ie the Minister and/or the Housing Controller must be made by way of judicial review. Secondly, the plaintiffs' suit was only limited to the developer and did not include the Minister and/or the Housing Controller whose decision in allowing the EOT is being challenged. With reference to this issue, I am of the opinion that the non inclusion of the Minister and/or Housing Controller as parties is fatal as both the Minister and/or the Housing Controller must be given the right to be heard (better known as the *audi alteram partem* principle as explained by the Federal Court in *Dr Lourdes Dava Raj a/l Curuz Durai Raj v Dr Milton Lum Siew Wah & Anor* [2020] 5 MLJ 185). Thus, the plaintiff's application for a declaratory order that the EOT given was null and void is flawed and irreparable. As held by the Federal Court in *Ang Ming Lee*, the absence of any affidavit from the Minister had fortified its finding that there was no decision from the Minister (see paras 65–68). This further reinforces my view that that the Minister should rightly be named as a party by the plaintiffs in challenging the EOT.

[37] In a situation where a litigant uses the court's machinery improperly, the court is vested with ample powers to strike out an irregular proceeding. In *Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors* [1995] 4 MLJ 764, the High Court held that:

> Thus, upon proper interpretation of O 2 and the authoritative views expressed by the aforesaid authors, I hold that, not only does the court have a clear and unencumbered discretion on the question of whether to convert the originating summons into writ action, but if the court declines to exercise its discretion, it is vested with ample powers to strike out an irregular proceeding, upon an application made. The decision of Chang Min Tat J (as he then was) in *Abdul Majid v Haji Abdul Razak* [1971] 2 MLJ 228 (refd) lends further support to my above view, as therein it was held that 'the originating summons is not a suitable medium or process for the determination of the issues raised' and the originating summons therein was dismissed in limine.

(See also *Hadi bin Hassan v Suria Records Sdn Bhd & Ors* [2005] 3 MLJ 522.)

Determination on questions (vi) and (vii)

[38] The issue in both the above questions predominantly relates to the issue of limitation. It is trite law that one who wishes to enforce its rights has to do so within time. I am of the firm view that the cause of action for a contract accrues from the date of its breach and time begins to run from that breach.

[39] On the point of limitation period, I find guidance in the decision in the case of *Nasri v Mesah* [1971] 1 MLJ 32 which supports the defendant's contention that the right to bring an action may arise on various events, but it has always been held that the statute runs from the earliest time at which an

action could be brought:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128 131). In *Reeves v Butcher* (1891) 2 QB 590 511 Lindley LJ said:
>
> > This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* LR 4 QB 509 511, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

[40] In *Ayob bin Salleh v AmGeneral Insurance Bhd & Anor* [2015] 11 MLJ 301, it was held that:

> [53] Thus, in so far as the issue of limitation is concerned, the position in law is that time begins to run from the earliest point of time when the plaintiff could commence an action. The principle in this regard was succinctly stated by the Federal Court in *Nadefinco Ltd v Kevin Corporation Sdn Bhd* [1978] 2 MLJ 59 at p 61 where His Lordship Suffian LP quoted the case of *Reeves v Butcher* [1891] 2 QB 509 per Lindley LJ at p 511:
>
> > The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

[41] In so far as statute is concerned, s 6(1)(a) of the Limitation Act 1953 provides that:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say — actions founded on a contract or on tort ...

[42] I agree with the defendant's counsel contention that cause of action is the existence of a factual situation which entitles one person to obtain from the court a remedy against another person. In this regard, reference was made to *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 as follows:

> What then is the meaning of 'a cause of action'? 'A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudicated by the appellant/defendant's act.

[43] The plaintiffs' claims which were filed on 18 June 2020 are time-barred given that the breach as alleged by the plaintiffs has occurred as early as on:

(a) in respect of Suit 301 — 24 July 2012;

(b) in respect of Suit 303 — 28 October 2013; and

(c) in respect of Suit 305 — 11 July 2012 and 18 July 2012.

[44] In this regard, six years' time limitation has set in to bar the plaintiffs' claims on the following dates:

(a) in respect of Suit 301 — 24 July 2018;

(b) in respect of Suit 303 — 28 October 2019; and

(c) in respect of Suit 305 — 11 July 2018 and 18 July 2018.

[45] This court is of the considered view that the period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed on the ground of equitable consideration.

[46] The provision of s 6(1)(a) of the Limitation Act 1953 is mandatory in nature. This court has no discretion or inherent powers to condone the delay if the action is filed beyond the prescribed statutory period of limitation or if the cause of action is barred by limitation unless the matter is covered by any of the exceptions, which is not the case here.

[47] Therefore, this court has not only the power, but also the duty to consider as to whether the action is time barred, and if it is found to be time barred, the court is duty bound to strike out the action (see *Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors* [2010] 9 MLJ 603).

[48] The rationale of the law of limitation has been lucidly explained by the late Hashim Yeop Sani, Chief Justice of Malaya, in the case of *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 at pp 413–414 in this way:

> The limitation law is promulgated for the primary object of discouraging plaintiff's from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accordance with the maxim interest reipublicae ut sit finis litium that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[49] Justice Abdul Malik Ishak in the case of *Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur* [2006] 2 MLJ 137 further referred to the Privy Council case of *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1, of which I agree:

A It goes without saying that stipulations as to time must be strictly followed and cannot be treated lightly. Legal practitioners should always be wary of the time constraint and must always double check whether limitation has set in. Thus, when a defence of limitation is clearly available to the defendant, like the present case at hand, the defendant ought not to be deprived of it and that right cannot be taken away by anyone willy-nilly. Lord Brightman in the case of *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1, puts it rather well when His Lordship said at p 5 of the report:

> In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable Their Lordships see no compelling reason for concluding that the respondents acquired no 'right' when the period prescribed by the 1948 Ordinance expired, merely because the 1948 Ordinance and the 1974 Act are procedural in character. The plain purpose of the 1974 Act, read with the 1948 Ordinance, was to give and not to deprive; it was to give to a potential defendant, who was not on 13 June 1974 possessed of an accrued limitation defence, a right to plead such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence which he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he had been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

[50] The Privy Council case of *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 was cited in approval by the Court of Appeal in *Suruhanjaya Pelabuhan Pulau Pinang v Boss s/o Ramasamy* [2000] 4 MLJ 153 where at p 165 the court stated that the defence of limitation is clearly available to the appellant of which they could not be deprived of it.

[51] The defendant in this present case should be entitled to find comfort in the fact that it is no longer at risk from a stale claim given that the SPAs have been entered into more than six years ago. It should be able to part with its records and be unencumbered from any burden in obtaining proof of witnesses related to the granting of EOT back in year 2010.

[52] The underlying rationales behind the need to prescribe statutory limitation periods for the causes of action of the temporal beings include:

(a) lapse of long time renders the claims stale;

(b) lapse of long time results in loss of evidence or in fading memories of witnesses or in the demise or disappearance of witnesses;

(c) lapse of long time results in intervening rights of innocent third persons or bona fide purchasers for value subsequent thereto; and

(d) lapse of long time causes material disruptions in the lives, relationship, etc of affected persons.

(See: *Sunitha Madhu (membawa tindakan ini sebagai pentadbir sah harta pusaka simati, Madhu a/l KV Dharan) v Palayam a/l Nagappan & Ors* [2021] MLJU 301; [2021] 1 LNS 296.)

[53] I am aware of the decision of *Ang Ming Lee* raised by the plaintiffs' counsel and the said decision in respect of HDA being a social legislation designed to protect the house buyers against the developer. Nevertheless, in so far as the claim of LAD is concerned, I am of the view that the protective hands of this court should not reach beyond the fence of limitation period which is statutorily prescribed, otherwise it will give rise to gravely unfair and disruptive consequences for past transactions. Balance must be struck between the right of the purchasers in enforcing their rights to LAD and the law of limitation which requires strict observation.

[54] I find favour in the defendant's counsel argument that none of the following time reference points, assuming taking the latest date, would have met the statutory time limit given the delay:

(a) date of the SPAs;

(b) 25 January 2017, being the date of vacant possession; and

(c) 26 November 2019, being the date of when the decision in *Ang Ming Lee* is delivered by the Federal Court.

[55] In so far as the declaratory orders sought by the plaintiffs are concerned, I opine that the plaintiff/s are out of time given that a judicial review application must be filed within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant in line with O 53 r 3(6) of the ROC 2012.

[56] In *Sunway D'Mont Kiara Sdn Bhd v Pesuruhjaya Khas Cukai Pendapatan and another application* [2016] MLJU 1840; [2018] 7 CLJ 666, the applicants sought amongst other to quash decisions of the Special Commissioner For Income Tax who had rejected their application for extension of time to lodge their notice of appeal to challenge the notices of assessment the year 2003. The applicants further sought for a declaration that the respondent be bound and shall give effect to the Federal Court decision in *Ketua Pengarah Hasil Dalam Negeri v Metacorp Development Sdn Bhd* vide Civil Application No 08(F)-371 of 2011 (W) (unreported) and the Court of Appeal decision vide *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another*

appeal [2006] 3 MLJ 597; [2006] 2 CLJ 835 which held that gains arising from compensation for compulsory acquisition of land are not subject to income tax as the elements of compulsion vitiates the intention to trade.

[57] In essence, the applicant in *Sunway D'Mont Kiara Sdn Bhd* sought to obtain a declaration by relying on cases decided in 2006 and 2013 to apply to the factual matrix of their case which was decided by the Special Commissioner of Income Tax in 2004. In dismissing the case, Asmabi J (later JCA) held that it would be absurd and against public policy to allow the applicant to do so:

> If the respondent and/or the court were to allow this to happen, this would lead to a floodgate for all litigants to apply for extension of time each time cases involving their rights were decided by the court differently from the earlier decisions of the court. There would be no finality in the decisions and the whole judicial process would be in a total mess ...

[58] Given the background of the present suits which was after the decision of the Federal Court in *Ang Ming Lee* without going through the process of judicial review, I have no doubt that the defendant herein is totally caught off guard. I am also of the view that the defendant is clearly at a disadvantage of having to defend the decision of the Minister and/or Controller which was given in 2010, against the decision in *Ang Ming Lee* which was decided circa ten years later in 2020. Bearing in mind that the law back in 2013 was as held in *Sentul Raya Sdn Bhd* which allowed the developer to apply for a deviation of the terms of the prescribed SPA in Schedule H of the HDR, I share the same view as Asmabi J. that to allow the decision in *Ang Ming Lee* to apply to the facts of this case would be absurd and against public policy. It is my respectful view that to do so will not only open unnecessary floodgates against all developers in this country leading to a crippling effect on the housing industry, it will also lead to judicial chaos with thousands of cases being filed in court claiming additional LAD pursuant to and based on *Ang Ming Lee*.

[59] In addition to my above reasoning, I am also not in favour of the plaintiffs' submission that their cause of action starts running from the time vacant possession is handed over to the purchaser/s as I am of the view that they are estopped from claiming further LAD. My rationale for finding so can be seen in my answer to the following question.

Determination on question (viii)

[60] It is also the defendant's contention that by virtue of the settlement agreement entered into between the plaintiff/s and the defendant, the plaintiff is estopped from pursuing the current suit.

[61] The plaintiffs on the other hand, contend that estoppel is not applicable for the reason that estoppel cannot override a statutory provision such as laid down in Schedule H of the HDA. The plaintiffs' counsel also brought to my attention the case of *Hedgeford Sdn Bhd v Sri Gananatha a/l Sivanathan & Ors* [2018] MLJU 1424; [2018] 1 LNS 1497 where the court drew a fine distinction in respect of settlement letters in the *Oxbridge Heights* case where the settlement is regarded as a 'regulated settlement', moderated and endorsed by a regulatory authority so that there is a level playing field between the developer and the purchasers.

> [137] In my view, if the plaintiff intends to rely on s 6(4) of the Contracts Act 1950, then they have the burden of demonstrating on a balance of probabilities that the purchasers had intentionally agreed to forgo their statutory entitlement under clause 27 of the SPAs. The fact that PW1 and PW4 were themselves ignorant of clause 27 of the SPA, makes it quite implausible that the purchasers (D2 to D24) could be aware of their entitlement under clause 27 of the SPAs. And if the plaintiff was desirous of cementing the so-called settlement correspondence and to exalt it into a firm and binding legal agreement such that it complies with s 6(4) of the Contracts Act 1950, then much more has to be done to establish convincingly that the purchasers (D2 to D24) had agreed to waive their rights to claim LAD under clause 27 of the SPAs. Hence, the mere fact that the purchasers had signed the LAD settlement letters and banked in the cashier's orders, will not suffice. I am not suggesting that it is necessary that in every case there should be a 'regulated settlement' of the Oxbridge type, although it would be advisable that there be others such as the purchasers' solicitors, Jabatan Perumahan Negara or perhaps even the National House Buyers Association (HBA) (which is a voluntary, non-political, non-governmental, non-profit organisation manned by volunteers to strive for a balanced, fair and equitable treatment for house buyers in their dealings with housing developer), to be involved in the negotiation process so that house buyers will know exactly what they are signing up for or waiving, as the case may be.

[62] The plaintiffs' counsel cited the case of *Oxbridge Height Sdn Bhd v Abdul Razak Mohd Yusof & Anor* [2014] MLJU 1932; [2015] 2 CLJ 252 to argue that the LAD provision in the SPA has a statutory force of law and cannot be contracted out.

[63] Contrary to the observations of the plaintiffs' counsel, Ariff Yusoff JCA in the case of *Oxbridge Heights* referring to s 6(4) of the Contracts Act 1950, affirmed the settlement agreement entered into between the developer and the purchaser. The court proceeded on the basis that that there is no full contracting out of the LAD provision in the SPA and that the National Housing Department (JPN) was brought into the picture and kept fully appraised of the status of the housing project and the settlement agreement:

> ... Thus, even in the settlement agreement there was no total contracting out of the LAD provision in the SPA. If delivery of vacant possession had not been delivered by the new completion date, the respondents would have been at liberty to sue on

A the basis of the original LAD provision. We therefore found that on the peculiar facts of this appeal, there was no full contracting out and no situation where the purpose of the housing legislation being 'to protect the weak against the strong' was ousted. In terms of policy, there should be nothing illegal in law for a Settlement Agreement to be negotiated with the full participation and direction from JPN with
B a view to save a failing housing project from being an abandoned project. It will be in the public interest, and in the interest of house buyers, if the law allowed a regulated settlement and waiver of LAD on terms as specified in the settlement agreement which was the subject matter of this appeal. It was therefore not right and proper for the respondents, despite their promise to conditionally waive LAD under
C the SPA, to resile from their promise and sue for late delivery under the SPA as if the settlement agreement did not exist.

[64] Similarly in the present case, I am of the view that there is no full contracting out of the signed SPA given that the plaintiffs were entitled to, if
D not had been duly compensated based on the terms of the signed SPAs. It cannot be said that the settlement agreements are of no legal effect on the basis that they diminished or took away the statutory rights of the house buyers.

[65] Having reviewed the submissions of both parties, I am of the view that
E the difference between the case of *Oxbridge Heights* and that in *Hedgeford Sdn Bhd* is negligible as this court only has to consider whether there is a presence of an evidence that the plaintiffs had agreed to accept the amount offered as the full and final settlement in respect of their rights. A 'regulated settlement' of the
F *Oxbridge* type is only advisable but not necessary.

[66] The plaintiffs, being the parties entitled to enforce their rights of LAD, have the option either to refuse the amount offered, treat the term broken and forthwith sue for damages. On the other hand, they may acquiesce in the
G breach and treat the SPA as continuing. If they elect to take this course of action, the plaintiffs are then barred from pursuing any remedy.

[67] Ipso facto, I therefore apply the doctrine of estoppel in Suit 301 and Suit 305 and accept that the settlement agreements signed by the plaintiffs are
H conclusive proof of the terms which they have settled upon. Neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow them to do so. Waiver of rights is a direct result of the settlement letters signed by the plaintiffs in Suit 301 and Suit 305.

I *Determination of the remaining questions posed vide encl 22*

[68] In light of my above answers, I find no necessity to deal with the issues posed in the remaining questions.

CONCLUSION

[69] In the upshot, I allow the defendant's O 14A applications to dispose of the suits based on questions of law premised on the following reasons:

(a) the plaintiffs' suit ought to have commence by way of a judicial review application;

(b) the plaintiffs ought to have included the Minister and/or Housing Controller as parties to the suit;

(c) the failure of the plaintiffs to commence the suit by way of a judicial review and the non-inclusion of the Minister and/or Housing Controller was improper (*Ang Ming Lee* distinguished);

(d) the plaintiff's cause of action is statute barred (*Ang Ming Lee distinguished*); and

(e) the plaintiffs' cause of action is caught by the doctrine of estoppel.

[70] The plaintiffs' suit is hereby dismissed with costs of RM5,000 each to be paid by the plaintiffs to the defendant (subject to allocator). I order so accordingly.

Plaintiff's suits dismissed.

Reported by Ashok Kumar